IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 65 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

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Appearance:

1. INCOME TAX REFERENCE No. 65 of 1999

MR MANISH R BHATT for Petitioner No. 1

SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 28/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question of law has been referred for our opinion for assessment year 1989-90 :-

"Whether on the facts and in the circumstances of the case the Tribunal was right in holding that depreciation has to be carried forward to the extent of income determined u/s.115J ?"

2. The Assessing Officer computed the profits as per the regular provisions of the Income-tax Act at Rs.Nil and then computed the profits under Section 115J separately. As the profit computed under Section 115J was more than the profit computed as per regular provisions of the Income-tax Act, the profit computed under Section 115J at Rs.68,600/- was adopted. Before the Commissioner of Income-tax (Appeals), it was contended by the assessee that depreciation to the extent of the profit under Section 115J should be treated as unabsorbed and should be allowed to be carried forward. The Commissioner of Income-tax (Appeals) held that since Section 115J was just a deeming provision and could not regulate the carry forward of depreciation the assessee's contention was rejected. When the matter was carried before the Tribunal, the Tribunal, however, held in favour of the assessee after following the decision of the Madras Bench of the Tribunal in Shriram Investments Ltd.

3. At the hearing of this reference, our attention was invited to the decision of the Apex Court in Karnataka Small Scale Industries Development Corporation Ltd. vs. CIT, (2002) 258 ITR 770. The Apex Court analyzed the provisions of Section 115J(i) in the following terms :-

"Section 115J(1) commences with a non obstante clause. Plainly read, it provides for two stages:

(a) computation of income of the assessee under the Act in respect of any previous year relevant to the assessment year commencing on or after 1st April, 1988, and before 1st April, 1991;

(b) If the income as computed under the Act in respect of the relevant previous year is less than 30 per cent, of its book profit, then the deemed total income of the assessee chargeable to tax for the relevant previous year would be equal to 30 per cent of the book profit.

The first state referred to above envisages

computations of income under the Act, that is, after taking into consideration all deductions allowable under the Act. It is only after the deductions are given effect to, and if the resultant income is less than 30 per cent of the book profit, that the assessee's total income would be deemed to have a notional income fixed at 30 per cent of its book profit. It may be that the assessees are not required to pay tax on the figure of the assessable income arrived at after deducting the amounts permissible under the Act. However, it cannot be said that therefore the deductions are not taken into account. If the deductions had not in fact been allowed then the assessee would not have had an assessable income less than 30 per cent of its book profit, entitling it to pay tax only on 30 per cent of its book profit. In deeming the total income to be 30 per cent of the book profit, the deductions claimed are not ignored as contended by the appellants but are a necessary ingredient of the formula for applying the fictional total income. The decisions cited in the context of the operation of statutory fictions are not apposite as there is no notional or fictional but actual deduction. Once the deductions are taken into consideration and the assessee is put into the category of those companies covered by section 115J(1) only then is the assessee required to pay on a notional income of 30 per cent of its book profits.

Had Section 115J not been introduced, the assessee would have been entitled under the provisions of sections 32(2), 32A(3), 72(1)(ii), 73, 74, 74A(3) and 80J(3) to carry forward only the unabsorbed depreciation allowance under section 32, investment allowance under section 32A, losses under sections 72, 72A, 73, 74 and permissible deductions under section 80J to the following assessment year to be set off against the profits and gains of that assessment year. All that section 115J(2) does is to preserve this right viz. to carry forward the balance of the unabsorbed deductions in the relevant previous year to the next assessment year. Section 115J does not create any right nor does it serve to allow all the deductions taken into consideration for determining whether the total income should be quantified under section 115J(1), to be carried forward under sub-section (2) of section

115J. It allows only the unabsorbed losses, depreciation, investment allowance, etc., which otherwise could have been carried forward, to be carried forward."

In support of the above view, the Apex Court also relied on Circular No.495 dated 22.9.1987 issued by the Central Board of Direct Taxes, wherein it was clarified that sub-section (2) provides that the application of sub-section (1) of Section 115J would not affect the carry forward of unabsorbed depreciation, unabsorbed investment allowance, business losses to the extent not set off, and deduction under Section 80J, to the extent not set off as computed under the Income-tax Act.

4. In view of the aforesaid decision of the Apex Court, we answer the question in the negative i.e. in favour of the revenue and against the assessee.

The reference accordingly stands disposed of.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

sundar/-